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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MICHAEL SCHUNN, Petitioner - Appellant, v. DORA B. SCHRIRO; ARIZONA ATTORNEY GENERAL, Respondents - Appellees.	No. 06-15616 D.C. No. CV-04-01905-NVW MEMORANDUM [*]

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted June 18, 2008[**]

Before: REINHARDT, LEAVY, and CLIFTON, Circuit Judges

John Schunn, an Arizona state prisoner, appeals pro se the denial of his habeas corpus petition under 28 U.S.C. § 2254. He was convicted for burglary, armed robbery, sexual assault, and three counts of kidnapping. He contends that

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

the admission at his retrial of a co-defendant's prior trial testimony violated his Sixth Amendment right of confrontation because the co-defendant was not "unavailable." We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

"[H]abeas relief is warranted only where the state court's adjudication of the merits: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" *Bockting v. Bayer*, 505 F.3d 973, 977 (9th Cir. 2007) (quoting 28 U.S.C. § 2254(d)(1)-(2)).

"[T]he prosecution may introduce the prior testimony of a witness without running afoul of the Sixth Amendment, as long as two criteria are met: 'First, the prosecutor must prove that the witness is unavailable to testify at trial. Second, the defendant must have had the opportunity to cross-examine the witness at the prior hearing.'" *Jackson v. Brown*, 513 F.3d 1057, 1082 (9th Cir. 2008) (quoting *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998)). "A witness will be deemed 'unavailable' only if 'the prosecution authorities have made a good-faith effort to obtain his presence at trial.'" *Id.* at 1083 (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)). "The lengths to which the prosecution must go to

produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quotation omitted).

Schunn's co-defendant, who already had served his sentence, testified at Schunn's first trial, which ended in a mistrial on January 20, 2000. As stated by the district court, two Maricopa County Attorney's Office investigators and a police officer took numerous actions aimed at securing the co-defendant's presence at Schunn's retrial, including telephone calls and surveillance. In addition, after the first trial, the trial court and the prosecutor informed the co-defendant that he still was under subpoena. We affirm the district court's conclusion that the prosecution made a good faith effort and that the co-defendant was unavailable to testify at Schunn's retrial. *See Jackson*, 513 F.3d at 1082-83.[1]

AFFIRMED.

[1] To the extent that Schunn raises uncertified issues in his opening brief and requests broadening of the certificate of appealability, the request is denied.